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Case No. 02-1848

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

FRANKLIN KOTTSCHADE,

*Petitioner,*

v.

CITY OF ROCHESTER,

*Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

# BRIEF FOR THE RESPONDENT IN OPPOSITION

JOHN M. BAKER
*Counsel of Record*
CLIFFORD M. GREENE
PAMELA L. VANDERWIEL
GREENE ESPEL, P.L.L.P.
200 S. Sixth Street, Suite 1200
Minneapolis, MN 55402
(612) 373-0830

*Attorneys for Respondent City of Rochester*

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## QUESTIONS PRESENTED

1. In its 1997 decision in *City of Chicago v. International College of Surgeons*, did this Court overrule the second prong of its 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, even though this Court and federal courts throughout the nation continue to enforce *Williamson's* second prong?

2. If this Court has not already overruled *Williamson*'s second prong, should it do so in this case?[1]

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[1] To the extent that the Petition purports to raise other issues, those issues were abandoned below, either by Petitioner's representations to the District Court, or by his failure to raise them in his Complaint, or brief in opposition to the City's Motion to Dismiss in the District Court, or Fed. R. App. P. 10(b)(3)(a) Statement of the Issues, or his failure to brief those issues to the District Court or the Court of Appeals.

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## BRIEF OF RESPONDENT IN OPPOSITION

The Petition attacks the lower courts' straightforward application of a century-old principle of constitutional law to an ordinary set of facts. The Takings Clause of the United States Constitution does not proscribe mere "takings" of property, but only "takings without just compensation." *Brown v. Legal Found. of Wash.*, -- U.S. --, 123 S. Ct. 1406, 1419 (2003); *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 658-59 (1890). Thus, where state law provides an adequate avenue for seeking compensation for alleged takings of property, an essential element of a takings claim is not present unless the plaintiff has pursued such avenues and failed to obtain just compensation. This requirement is now known as the "second prong" of the *Williamson* rule. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

This federal takings suit is Petitioner Franklin Kottschade's first and only attempt to obtain compensation for an alleged taking. He bypassed undisputedly adequate avenues for seeking compensation under Minnesota law. He has not attempted to fit this suit within any recognized exception. Instead, he advances two alternative positions: either this Court overruled *Williamson's* second prong in the supplemental jurisdiction case of *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997), or it should overrule *Williamson* now.

Neither Kottschade nor his amici have cited any opinion of any judge of any court in this nation agreeing with their position on either issue, even in dictum or in dissent. Thus, there is no conflict for the Court to

resolve, and remarkably little legal authority for their position. The fact that Petitioner, advocates for special interests, and one distinguished professor disagree with the reasoning and consequences of *Williamson* does not make this case worthy of this Court's review.

Moreover, review of this case would require this Court to engage in an excessive degree of speculation, for reasons solely of the Petitioner's own creation. Kottschade complains about the consequences of pursuing state-law procedures, but has ensured that those consequences are speculative and hypothetical by refusing to embark down that path. Like the Court of Appeals below, this Court should decline to answer those questions in the abstract setting Petitioner has created.

## STATEMENT OF THE CASE

Petitioner brought a suit in federal court presenting a single legal theory – that the City of Rochester took his property without just compensation in violation of the United States Constitution. His suit was dismissed because he was required by this Court's rulings to seek relief first under state law before filing a federal takings claim, and he did not.

The Eighth Circuit faithfully followed this Court's precedents and affirmed the dismissal. *Kottschade v. City of Rochester,* 319 F.3d 1038 (8th Cir. 2003). His petitions for rehearing failed. There was no dissent from the panel ruling below and no vote in favor of panel rehearing or rehearing en banc.

## REASONS FOR DENYING THE PETITION

### I. THE PETITION AND AMICI CONFUSE THE ACTUAL ISSUE DECIDED BELOW.

The courts below decided a single question: whether "prong two" of *Williamson* required Kottschade to first seek relief as a matter of state law before his federal-law takings claim could be complete. The courts below did not decide that a defendant may lawfully remove an unripe takings claim. They did not decide that state-court takings decisions have issue-preclusive effect in subsequent federal suits. The lower courts did not decide those questions because the facts of this case do not present them. If the Court is interested in deciding those questions, it should wait for a case that presents them.

### II. THE PETITION FAILS TO SATISFY ANY OF THIS COURT'S CRITERIA FOR A GRANT OF CERTIORARI.

#### A. No Court Has Agreed With Petitioner's Arguments, So No Genuine Conflict Among the Circuits Exists.

As this Court has recognized, "the principal purpose for which [this Court uses its] certiorari jurisdiction . . . is to resolve conflicts among United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). This case does not fulfill that "principal purpose," however, because it was filed in an *unsuccessful* effort to *create* a conflict between the circuits.

The Petition may be distilled down to two issues: whether this Court overruled *Williamson*'s second prong in its 1997 *International College of Surgeons* decision, and if not, whether it should do so now. No court has ever answered "yes" to either question. To the contrary, virtually every U.S. court of appeals has continued to uphold this important principle of federal takings law, before and after *International College of Surgeons* was issued.[2] *See, e.g., Tower v. Leslie-Brown,* 326 F.3d 290, 297-98 (1st Cir. 2003); *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals,* 282 F.3d 83, 89 (2d Cir. 2002); *Cowell v. Palmer Township,* 263 F.3d 286, 290 (3d Cir. 2001); *Greenspring Racquet Club Inc. v. Baltimore Co., Md.,* 232 F.3d 887 (table), 2000 WL 1624496, at *4 (4th Cir. 2000), *cert. denied,* 532 U.S. 957 (2001); *John Corp. v. City of Houston,* 214 F.3d 573, 581 (5th Cir. 2000); *Gabhart v. City of New Port,* 208 F.3d 213 (table), 2000 WL 282874, at *3 (6th Cir. 2000); *Forseth v. Vill. of Sussex,* 199 F.3d 363, 370 (7th

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[2] The only U.S. court of appeals that has not issued a decision after *International College of Surgeons* enforcing *Williamson's* second prong is the Court of Appeals for the District of Columbia Circuit, which does not appear to have reviewed a case presenting the opportunity. The District Court for the District of Columbia, however, has continued to apply *Williamson*'s second prong. *See Dist. Intown Properties Ltd. P'ship v. District of Columbia,* 23 F. Supp. 2d 30, 32-35 (D.C.C. 1998) (applying *Williamson*'s second prong and finding the takings claim ripe because "District law does not provide procedures to compensate plaintiffs for the denial of their building permit applications"), *aff'd,* 198 F.3d 874 (D.C. Cir. 1999), *cert. denied,* 531 U.S. 812 (2000). The District, which prevailed on the merits of the takings claim in both courts, does not appear to have challenged the District Court's *Williamson* analysis on appeal.

Cir. 2000); *Carpenter Outdoor Advertising Co. v. City of Fenton*, 251 F. 3d 686, 690-91 (8th Cir. 2001); *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1100 (9th Cir. 1998); *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319, 1322 (10th Cir. 1998); *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225, 1231 (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000); *Greenbrier v. United States*, 193 F.3d 1348, 1358 n.14 (Fed. Cir. 1999), *cert. denied*, 530 U.S. 1274 (2000).

Kottschade himself acknowledges the absence of a conflict, by complaining in the Petition that dismissal of takings claims brought first in federal court "has been the *consistent lower court treatment* since *Williamson County*." (Pet. at 9 (emphasis added)).

At most, amicus Daniel Mandelker suggests there is a conflict between the courts of appeals on whether a loss in state court while complying with *Williamson's* second prong should be given issue-preclusive effect in a subsequent federal takings suit. (Amicus Brief of Mandelker at 8-11).[3] However, that was not at all the question decided below. The Court of Appeals did not need to answer that question, and specifically declined

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[3] The Petition itself ignores this conflict, presumably for strategic reasons. Petitioner would prefer that this Court believe that *Williamson County's* second prong creates a complete barrier to the federal courts, by sending takings plaintiffs to state court and then estopping them from relitigating issues upon their return. As noted by the Court below, it is not clear whether issue preclusion would apply in that setting, but the question should not be decided in the abstract setting now presented. *Kottschade*, 319 F.3d at 1041-42.

to do so. *Kottschade,* 319 F.3d at 1041-42. It is a question that will arise (if at all) after the Petitioner files *Kottschade II* in state court, loses, then files *Kottschade III* in federal court, and seeks to litigate the same issues a second time. As the briefs of other amici inadvertently demonstrate, other suits have directly presented the question of issue preclusion in a concrete setting, including suits that may reach this Court in the future. (*See* Amicus Brief of Pac. Legal Found. & San Remo Hotel at 1; Amicus Brief of Evandro S. Santini & Santini Homes, Inc. at 6-8.) Such suits provide a far better vehicle for considering the question than this one.

### B. The Decisions Below Did Not Create a Conflict with this Court's Decisions.

By recognizing that Kottschade's refusal to file a state-law suit rendered his federal takings claim incomplete, the courts below created no conflict with modern decisions of this Court. Rather, those decisions were faithful to the explicit holding of *Williamson*.

In particular, the decisions below do not conflict with this Court's decision in *International College of Surgeons*. This Court's holding in *International College of Surgeons* merely plugged a hole that the Seventh Circuit briefly created in the supplemental jurisdiction of federal courts to consider state-law claims. *See Int'l Coll. of Surgeons,* 522 U.S. at 163. This Court had "granted certiorari to address whether a case containing claims that local administrative action violates federal law, but also containing state law claims for on-the-record review of the administrative findings, is within the jurisdiction of the federal district courts." *Id.* By answering "yes" to that question, this Court said nothing

about whether an unripe federal takings claim, by itself, can be filed in, or removed to, federal court. As this Court recently observed, "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001).

The parties in *International College of Surgeons* did not seek (or even need) to rely upon a federal takings claim as a basis for federal jurisdiction. The plaintiff's complaint in that action included a variety of other federal causes of action, which were more than sufficient to support federal jurisdiction, and, therefore, removal. As described by the District Court, the College's complaint also alleged that the Chicago Ordinance "violates equal protection by excluding religious organizations' church buildings from the Landmarks Ordinance without exempting other not-for-profit organizations," and "denies due process by authorizing the Commission to preliminarily designate property as a 'landmark' without affording the owners notice and an opportunity to object before the preliminary designation is applied." *Int'l Coll. of Surgeons v. City of Chicago,* Nos. 91 C 1587 & 5564, WL 6729, at *2 (N.D. Ill. Jan. 10, 1992). Those other federal causes of action were complete without the need to first seek compensation under state law.[4] Indeed, the

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[4] Petitioner contends that the other federal claims of the College are "of no moment" because "the same *Williamson* County ripeness rule has been applied to those claims." (Pet. at 8 n. 4.) Examination of the exact allegations of those other federal claims should suggest otherwise. As many U.S. Courts of Appeals have recognized, moreover, there is no reason to require the second prong of *Williamson* in non-takings claims, because those constitutional rights have no

federal takings claim had been dismissed by the District Court in an early Rule 12(b)(6) ruling. *Id.* at *4.[5]

The notion that this Court overruled *Williamson* in its *International College of Surgeons* decision is also contrary to this Court's most recent jurisprudence. Two

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counterpart to the "without just compensation" language of the Takings Clause. *See, e.g. John Corp. v. City of Houston,* 214 F.3d at 584; *McKenzie v. City of White Hall,* 112 F.3d 313, 317 (8th Cir. 1997); *Strickland v. Alderman,* 74 F.3d 260, 265 (11th Cir. 1996); *Acierno v. Mitchell,* 6 F.3d 970, 977 n.17 (3d Cir. 1993); *Southview Assocs., Ltd. v. Bongartz,* 980 F.2d 84, 96-97 (2d Cir. 1992), *cert. denied,* 507 U.S. 987 (1993); *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 882 F.2d 1398, 1404-07 (9th Cir. 1989), *cert. denied,* 494 U.S. 1016 (1990), *overruled on other grounds by Armendariz v. Penman,* 75 F.3d 1311, 1326 (9th Cir. 1996). These authorities further undermine the reasonableness of the Petitioner's logical leap (from the recognition of federal jurisdiction in *International College of Surgeons* to the conclusion that *Williamson's* second prong has been overruled).

[5] The City of Chicago sought dismissal of the federal takings claim in part under *Williamson's* second prong. *See Int'l Coll. of Surgeons,* 1992 WL 6729, at *4 n.3. The District Court did not address the jurisdictional flaw in the federal takings claim first, but addressed its merits and dismissed the takings claim without reaching the City of Chicago's *Williamson* argument. *Id.* Commentators have viewed this as an insignificant error. As Wake Forest University Law Professor Thomas Roberts has recognized, "[t]his apparent error was not noted by the Supreme Court, which is unsurprising since it was of no significance to the issue in the case." Thomas E. Roberts, *Procedural Implications of* Williamson County/First English *in Regulatory Takings Litigation,* 31 ENVRL. L. REP. 10353, 10365 (April 2001).

years after *International College of Surgeons,* this Court itself treated *Williamson's* second prong as alive and well in its decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999). At the conclusion of its ruling, which recognized a Seventh Amendment right to a jury trial in takings cases, this Court addressed the limitations of its holding. It reaffirmed that "a federal court . . . cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate post deprivation remedy." 526 U.S. at 710.[6] Because *Williamson* has not been overruled, the lower courts' rulings created no conflict with rulings of this Court.

### C. Review of this Case would Serve no Purpose but to Reaffirm or Overrule *Williamson* Itself, and the "Special Justification" for Overruling a Decision is Absent Here.

Petitioner and amici dislike the second prong of *Williamson* because they disagree with the reasoning behind it and they dislike or fear its effects. For those reasons, they wish it would go away. That strategy is

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[6] The continued vitality of *Williamson's* second prong in this Court's eyes is further reflected in other portions of the *Del Monte Dunes* decision. *See, e.g.,* 526 U.S. at 710. Del Monte Dunes "was entitled to proceed in federal court under § 1983 because, at the time of the city's actions, the State of California did not provide a compensatory remedy for temporary regulatory takings . . . . Had the city paid for the property or *had an adequate post deprivation remedy been available,* Del Monte Dunes would have suffered no constitutional injury from the taking alone." *Id.* (emphasis added).

apparent not only from their attacks on a supposed "flaw at the core of *Williamson County*" (*See* Pet. at 19), but from their inability to present this Court with any saving construction of *Williamson's* second prong. Indeed, the applicability of *Williamson* to this case is so clear that the Court could hardly reverse the decisions below without entirely abolishing *Williamson*'s second prong. That cannot be an accident; those who seek radical shifts in the law are attracted to cases that offer the Court no middle ground. But from this Court's perspective, that feature should make this suit a less attractive candidate for review.

There are divisions among the lower courts about the full extent of *Williamson's* reach. U.S. courts of appeals disagree about whether *Williamson's* second prong applies to claims alleging a taking for a private purpose,[7] or whether *Williamson's* second prong applies to facial challenges.[8] The facts of this case, however, present this Court with no opportunity to resolve either of those conflicts. Kottschade brought an as-applied takings claim that does not dispute the public nature of the City's purpose.

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[7] *Compare Daniels v. Area Plan Comm'n v. Allen County,* 306 F.3d 445, 453 (7th Cir. 2003) (holding that prong two applies to private-purpose takings claims) *with Montgomery v. Carter County, Tennessee,* 226 F.3d 758, 770 (6th Cir. 2000) (holding that prong two does not apply).

[8] *Compare San Remo Hotel,* 145 F.3d at 1101-02 (holding that prong two applies) *with Daniels,* 306 F.3d at 458 n. 13 (holding that prong two does not apply).

### 1. The "special justification" needed to overrule an established precedent is not present in this case.

This Court has articulated the extraordinary circumstances that must be demonstrated before this Court will consider overruling a well-established precedent. A "special justification" is required, well beyond what the Petitioner and amici have provided in this case. As this Court recently noted in *Harris v. United States*, 536 U.S. 545 (2002):

> Stare decisis is not an "inexorable command," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting), but the doctrine is "of fundamental importance to the rule of law," *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 494, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). Even in constitutional cases, in which stare decisis concerns are less pronounced, we will not overrule a precedent absent a "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984).

*Harris*, 536 U.S. at 556-57.

The reasons that Petitioner and amici offer for overruling *Williamson* are insufficient to satisfy the "special justification" standard as applied by this Court. There has not been "a significant change in, or subsequent development of, our constitutional law" that destroys the vitality the principles upon which

*Williamson* was decided. *Contrast Agostini v. Felton*, 521 U.S. 203, 236 (1997).[9] In fact, the Petitioner's criticisms have nothing to do with intervening *changes* in constitutional, statutory, or common law. Petitioner's complaints about issue preclusion do not result from any intervening change in the law. They merely concern the manner in which certain courts have been applying principles of issue preclusion that were already established when *Williamson* was decided. Access to federal courts for other types of plaintiffs did not expand after 1985 in a manner that created or exacerbated an unfairness or inconsistency. The world has not changed so "as to have robbed the [*Williamson*] rule of significant application or justification." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992) (plurality) (citing *Burnet*, 285 U.S. at 412 (Brandeis, J., dissenting)). *Williamson's* second prong has not "proven to be intolerable simply in defying practical workability." *Casey*, 505 U.S. at 854 (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)).

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[9] Similarly, the "precedents before and after [*Williamson's*] issue" do not "contradict its central holding" in a way that creates uncertainty and "erodes" its foundations. *Contrast Lawrence v. Texas*, -- U.S. --, 123 S. Ct. 2472, 2483 (2003). *Cf. Lawrence*, 123 S.Ct. at 2489 (Scalia, J., dissenting) ("we should be consistent rather than manipulative in invoking the doctrine" of stare decisis).

### 2. Petitioner's pre-emptive attack on *Williamson* is the worst setting to consider the issues he raises.

Few derogatory adjectives are omitted from Petitioner's attack on the supposed effects of *Williamson's* second prong and issue preclusion. The City does not believe this Court has created a "diabolical trap," "Catch-22," "bait and switch," or "mess." But even if the Court happened to agree that prong two and preclusion can create an unfair outcome, granting review of this case is the worst of the available alternatives for redressing that supposed unfairness.

Because Petitioner refused to pursue state remedies, his case presents the Court with little more than an opportunity to affirm *Williamson* or perform a complete about-face and overrule it. By overruling *Williamson* the Court would risk injury to itself as an institution. As a plurality of this Court noted in *Casey*:

> There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

*Casey*, 505 U.S. at 864-66. Moreover, Petitioner's refusal to pursue state-law remedies leaves the Court no choice but to speculate about whether that state-court proceeding would have been conducted and resolved in

a way that precluded any subsequent federal takings suit.

By contrast, if the Court granted review of a takings case in which prior state-court findings had actually been given issue-preclusive effect in federal court, it could – *for the first time* – answer the questions of whether and when relitigation of issues should truly be forbidden in that setting. Although the questions may not be "certworthy" in either setting, this second alternative is far preferable than the present one.

The first alternative is an ax, the second, a scalpel. Only the second approach allows the Court to fine-tune the law by choosing from a range of alternatives.[10] Only the second approach resolves a conflict between the circuits. Only the second approach presents the supposed "unfairness" of issue preclusion in a concrete, rather than hypothetical, setting. Only the second approach avoids the risk that "legitimacy of the Court would fade with the frequency of its vacillation." *Id.*

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[10] For example, the Court might apply general preclusion principles notwithstanding the inability of the plaintiff to first file in federal court; the Court might interpret the "full and fair opportunity" element of issue preclusion to require a different result in certain circumstances; the Court might deny issue preclusion where an effective *"England"* reservation has been made, as mentioned by the Court of Appeals below; *Kottschade,* 319 F.3d at 1041-42 (citing *England v. La. State Bd. of Med. Exam'rs,* 375 U.S. 411 (1964)); or the Court might simply suspend the application of issue preclusion in takings cases.

### D. Petitioner Needs this Court to Overrule Not Only its Decision in *Williamson*, But Over a Century of this Court's Other Precedents.

*Williamson* was not an aberration. The principles embodied in *Williamson's* second prong were articulated over a century ago, and have been consistently followed by this Court since then. This Court has continued to follow those principles after *International College of Surgeons*, and as recently as March 2003. Thus, Kottschade cannot simply ask this Court to overrule *Williamson*; he must ask this Court to disregard a line of decisions faithfully followed for over a century.

In explaining why landowners must seek "just compensation" and not simply wait for it to be tendered, the *Williamson* decision quotes language first articulated by the first Justice Harlan in *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 658-59 (1890), where this Court stated:

> It is further suggested that the act of congress violates the constitution in that it does not provide for compensation to be made to the plaintiff before the defendant entered upon these lands for the purpose of constructing its road over them. This objection to the act cannot be sustained. The constitution declares that private property shall not be taken "for public use without just compensation." It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken; but the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed.

135 U.S. at 658-59 (emphasis added). This principle was soon applied to local takings. *See Sweet v. Rechel*, 159 U.S. 380, 400-407 (1895) (per Harlan, J.) (finding no taking without just compensation by a city because the commonwealth had enacted a statute providing an avenue for certain and adequate compensation for the taking). This Court continued to articulate these principles in a variety of different kinds of takings cases. *See, e.g., Joslin Mfg. Co. v. City of Providence,* 262 U.S. 668, 677 (1923) ("It has long been settled that the taking of property for public use by a state or one of its municipalities need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge."); *Hurley v. Kincaid,* 285 U.S. 95, 103 (1932)

(holding that the ability of landowner to seek compensation for taking under Tucker Act, after taking has occurred, makes injunction against taking unavailable); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949) ("Where the action against which specific relief is sought is a taking, or holding, of the plaintiffs' property, the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment."); *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 n.40 (1981) ("Such an alleged taking is not unconstitutional unless just compensation is unavailable."); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 (1984).

When *Williamson* was decided, only one justice dissented. *See Williamson*, 473 U.S. at 200 ("Justice White dissents from the holding that the issues in this case are not ripe for decision at this time.").

*Williamson's* second prong enjoys the strong support of the state and federal judiciaries. When many of the amici lobbied Congress to repeal *Williamson's* second prong through legislation, *See* H.R. 1534, S. 1204, S. 1256, S. 2271, 105th Cong, , those efforts were opposed by the Judicial Conference of the United States and the Conference of Chief Justices. The Judicial Conference concluded that it "would alter deeply ingrained federalism principles by prematurely involving the federal courts in property regulatory matters that have historically been processed at the state and local levels." S. Rep. No. 105-242, at 56-57 (1998). The Conference of Chief Justices, representing the highest courts of all 50 states, strongly opposed the

bill because it "would drastically change the traditional state and federal roles in 'takings' cases and upset the balance of our federal system in an area that is fundamentally a state and local matter." *Id.* at 56. The legislation failed in 1998, an outcome that attorneys for Kottschade and the amici attribute to "vehement" opposition to the repeal of *Williamson's* second prong.[11]

Just last term, this Court again quoted the principle underlying *Williamson's* second prong. In *Brown v. Legal Found. of Wash.*, this Court again noted that "t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." 123 S.Ct. at 1419 (quoting *Williamson).*

### E. In this Case, the Court will be Unable to Reach the Merits of Petitioner's Seventh Amendment Argument.

This case is a particularly poor vehicle for this Court to take up a sub-issue presented in the Petition – whether *Williamson's* second prong results in a deprivation of the Seventh Amendment right to a jury trial. Petitioner refers to "the practice in state courts generally, which don't submit regulatory taking liability

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[11] Counsel for the amici American Forest and Paper Association et al., and one of Petitioner's counsel, have recognized that proposition in a 1999 law review article: "A vehement opposition ultimately defeated S. 2271 in the Senate. The main contention of the Bills' detractors focused on the current ripeness requirement that a property owner must first exhaust state compensation remedies prior to receiving a federal hearing on the merits of a taking." John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness" Mess*"? 31 URB. LAW. 195, 197 (1999).

issues to juries." (Pet. at 29.) Kottschade neglects to mention that Minnesota is a clear exception to this supposed "general practice." *See Alevizos v. Metro. Airports Comm'n*, 317 N.W.2d 352, 360 (Minn. 1982) (recognizing a right to a jury trial in an inverse condemnation suit); MINN. STAT. § 586.12 (providing for a jury trial in mandamus cases, the traditional proceeding for inverse condemnation). A case arising in Minnesota therefore does not present the question raised by Kottschade – whether requiring him to go first to state court will deprive him of a Seventh-Amendment right to a jury trial.

Moreover, in this particular case there is a clear procedural bar to this Court's consideration of the Seventh Amendment question. Kottschade raised a Seventh Amendment issue for the first time in his appellate brief, after omitting it from his Complaint, brief in opposition to the City's Motion to Dismiss and oral argument to the District Court, and Federal Rule of Appellate Procedure 10(b)(3)(a) Statement of the Issues.

## III. THE PETITION CONTAINS MATERIAL MISREPRESENTATIONS.

Under Supreme Court Rule 15.2, respondents "have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." In compliance with that obligation, Respondent must call to the Court's attention

the following misstatements in the Petition, and correct them.[12]

### A. The Petition and Amici Misrepresent This Court's Holding in *International College of Surgeons v. City of Chicago*.

Petitioner urges this Court to grant review so that it may "clarify" or "reconcile" *Williamson* and *International College of Surgeons*. However, Petitioner's solution for "reconciling" *Williamson* and *International College of Surgeons* is to negate the explicit holding of *Williamson*, based on implications contrived from a misreading of *International College of Surgeons*. A *straightforward* reading of both decisions leaves nothing for this Court to reconcile, and no unfairness for this Court to cure.

Under Kottschade's logic, this Court created an irrational double-standard in *International College of Surgeons* (under which defendants have access to

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[12] The Petition also makes a misleading reference to the outcome of an "ABA retreat," and states that "[t]he ABA retreat thereby ended by asking for judicial help in resolving the dissonance between *Williamson* and *City of Chicago*." (Pet. at 7.) As noted in the introduction to the report, "[t]he Retreat did not advocate change in the essentials of the *Williamson County* ripeness requirements" because "[t]here was no consensus on such changes." TAKING SIDES ON TAKINGS ISSUES at 570 (Thomas E. Roberts ed., 2002). Moreover, "the Section [on State and Local Government Law] did not endorse or adopt the retreat report" and "[t]hus, the retreat report should not be cited as reflecting the position of the ABA or the ABA Section of State and Local Government." *Id.* at 567.

federal courts in regulatory takings cases, and plaintiffs do not). Kottschade's syllogism rests on a provably false premise. As explained above in Section II(B), federal jurisdiction was present in *International College of Surgeons* in spite of, not because of, the plaintiff's inclusion of a federal takings claim. An accurate account of the College's claims destroys the supposed implication that *Williamson* was impliedly overruled. It also destroys the supposed implication that defendants in takings claims receive preferential access to federal courts under the combined effect of *Williamson* and *International College of Surgeons.*

Under a fair reading of the two decisions, an unripened federal takings claim, by itself, cannot create federal jurisdiction – whether that jurisdiction is sought by a plaintiff or by a removing defendant.[13] The U.S. Court of Appeals for the Fifth Circuit recently

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[13] Thus, when a defendant removes an incomplete, "pure" takings claim, other federal courts have ordered a remand because of a lack of federal jurisdiction. *See, e.g., Eggleston v. Pierce County,* 99 F. Supp. 2d 1280, 1282 (W.D. Wash. 2000) ("I find that the removal by Defendants of plaintiff's inverse condemnation state claim to federal court is improper pursuant to the *Williamson County* ruling that unequivocally requires an exhaustion of state remedies before an attempt to obtain a remedy in federal court."). The Petition recognizes that such remands occur (Pet. at 6), but refuses to acknowledge their significance. Instead of recognizing that such remands undermine his "double-standard" argument, Petitioner treats the remands as one more thing to complain about. (Pet. at 6 (asserting that takings plaintiffs "are at times subjected to a judicial 'ping-pong game' whereby they file suit in state court, only to have it removed to federal court, which then remands it back to state court")).

demonstrated this principle when it enforced the second prong of *Williamson* in a case that the defendant had removed to federal court, and ordered a remand to state court on that basis. *See Sandy Creek Investors Ltd. v. City of Jonestown, Texas,* 325 F.3d 623, 626 (5th Cir. 2003) (ordering a remand of a takings claim removed to federal court by a defendant because "Sandy Creek has not exhausted its administrative or state court remedies as required by the second prong of *Williamson.*")[14] Thus, *Williamson* creates no unequal access to federal courts, no unfairness, and no discrimination against plaintiffs. If, as in *International College of Surgeons*, the takings claim is joined with at least one other federal cause of action, and at least one of those claims is ripe, then the case may be filed in, or removed to, federal court. In that setting as well, plaintiffs' and defendants' access to federal courts is equivalent. Whether or not such a case reaches federal court directly or by removal, *Williamson* would require the dismissal of the unripe federal takings claim.[15]

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[14] It is unfortunate that the landowner in *Sandy Creek Investors* did not ask for a remand before the District Court. As the Court of Appeals for the Fifth Circuit recognized, the District Court would have been obligated to grant such a motion. *Id.*

[15] *See, e.g., McDonald's Corp. v. City of Norton Shores,* 102 F.Supp.2d 431, 436 (W.D. Mich. 2000) (dismissing unripe federal takings claim in removed suit, but reaching the merits of other federal claims).

### B. Petitioner Repeatedly Misrepresents Portions of the Panel Decision Below.

The Petition represents that "*The Court of Appeals agreed* with the Petitioner that this situation represents 'an anomalous . . . gap in Supreme Court jurisprudence.'" (Pet. at i (ellipses in Petition, italics added); *see also* Pet. at 3 (the Eighth Circuit "*agreed* with Mr. Kottschade that the situation *was* 'anomalous'")) (emphasis added).)

Petitioner stripped the quoted words of their context. When that context is restored, the Eighth Circuit's supposed "agreement" with Petitioner's position disappears:

> The Supreme Court has not explicitly overruled or modified the ripeness requirements laid out in *Williamson* in the context of takings cases. The requirement that all state remedies be exhausted, and the barriers to federal jurisdiction presented by res judicata and collateral estoppel that may follow from this requirement, *may be anomalous.* Nonetheless *Williamson* controls the instant case. Compare this *perceived gap in Supreme Court jurisprudence* with this Court's observations in *Commonweath of Puerto Rico v. Branstad,* 787 F.2d 423 (8th Cir. 1986).

*Kottschade*, 319 F.3d at 1040-41 (emphasis added).[16]

### C. The Petition Grossly Mischaracterizes the City's Actions.

At this stage, this case is not about what the City did. It is about what the Petitioner did not do – file a state takings suit first. Nevertheless, the Petition misrepresents what the City did and did not do. If Petitioner ever files the required state-court suit, the City will proudly defend its actions. Unfortunately, however, the Petition (and Rule 15.2) require the City to briefly address the subject here.

The Petition falsely represents that "Rochester imposed conditions that were grossly disproportionate," (Pet. at 1), and that the City "attached conditions to the permit that reduced the number of homes from 104 to 26, and added nearly $70,000 in development costs to each unit – in a market where such homes sell for $125,000," (Pet. at 3). The City's conditions (to general development plan approval, not a permit) would have no such effect. Indeed, each of the conditions reflected an application of pre-existing ordinances and regulations applicable to all development. The City's ordinance provisions were in place before Kottschade gained title to his property.

The Petition also falsely represents that the City "repeatedly refused Mr. Kottschade's requests to explain

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[16] In lifting adjectives and phrases from law review articles, the Petitioner often shows a similar disregard for context, meaning, or completeness. (See Pet. at 8, 10, 15, 17, 23-25). However, the page limits do not permit this Brief to explain and correct every such instance.

how the conditions related to his development," (Pet. at 1), and flatly refused, twice, in writing, to explain the nexus and its proportionality, (Pet. at 3). The record below conclusively proves otherwise. Not only did the City prepare a 13-page Technical Report explaining the nexus and proportionality of the conditions to the Petitioner's proposed development, the City repeatedly offered to meet with Petitioner to find other ways to accomplish the intended development. Unfortunately, Petitioner repeatedly rejected the City's invitation to discuss possible modifications to the development proposal short of the elimination of all nine conditions.

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Dated: August 25, 2003

GREENE ESPEL, P.L.L.P.

Clifford M. Greene, Reg. No. 37436
John M. Baker, Reg. No. 174403*
Pamela L. VanderWiel, Reg. No. 305960
**Counsel of Record*
200 S. Sixth Street, Suite 1200
Minneapolis, MN 55402
(612) 373-0830

Attorneys for Respondent City of Rochester